(1) (3)

Nos. 06-1195 and 06-1196

IN THE

Supreme Court of the United States

LAKHDAR BOUMEDIENE, *et al.*,
Petitioners,

v.

GEORGE W. BUSH, *et al.*,
Respondents.

KHALED A. F. AL ODAH, *et al.*,
Petitioners,

v.

UNITED STATES, *et al.*,
Respondents.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF *AMICUS CURIAE* OF UNITED STATES SENATOR ARLEN SPECTER IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

Amicus is the Ranking Member of the Senate Committee on the Judiciary. During the 109th Congress, when the Military Commissions Act of 2006 and the Detainee Treatment Act of 2005 moved through the Senate, *amicus* was Chairman of the Committee and held several hearings to consider whether it is constitutionally permissible for Congress to deny the right of habeas corpus to detainees held at the United States Naval Station at Guantanamo Bay. Therefore, *amicus*, being intimately familiar with the statutory provisions implicated in these cases, urges this Court to grant review and to resolve the constitutional questions presented.

INTRODUCTION AND SUMMARY OF ARGUMENT

The United States began sending alien detainees to Guantanamo over five years ago, having previously found them to be enemy combatants when they were initially captured. During that time, some 390 detainees have been released, and others have been added. In total, the base remains home to 385 detainees, of whom eighty have been designated for release. By all accounts, there are some very dangerous individuals residing within the walls of Guantanamo. Toward the end of 2006, for example, the government transferred fourteen "high value" detainees to the base, including the alleged (and now, apparently, confessed) 9/11 mastermind, Khalid Sheikh Muhammad.[2] Moreover, reports indicate some twenty former detainees may have returned to the

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[1] This brief is filed with the consent of the parties. The parties' letters of consent will be filed together with this brief. Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no other person, other than *amicus* and its counsel, made a monetary contribution to its preparations or submission.

[2] *See* Dep't of Defense, Transcript of CSRT Hearing for ISN 10024 (Mar. 10, 2007); J. White, *Alleged Architect Of 9/11 Confesses To Many Attacks*, WASH. POST, Mar. 15, 2007, at A1.

battlefield to face U.S. forces. Given the lengthy debates and disagreements among Members of Congress as to the handling of these detainees, and the perception that the United States Court of Appeals for the District of Columbia Circuit failed to follow this Court's direction in *Rasul v. Bush*, 542 U.S. 466 (2004), this Court should review these cases this term.

The question presented here is not whether some of the individuals should continue to be detained. They should. The question is whether the U.S. Constitution ensures that the writ of habeas corpus is available for detainees to contest the legality of their detention by the executive.

The writ of habeas corpus is an age-old remedy for unlawful detention at the hands of the executive. The Founders imported this common law right from England; afforded it constitutional protection in the Suspension Clause, U.S. CONST. art. I., § 9, cl. 2; and authorized the federal courts to issue the writ, *see* Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73, 81-82.

Three years ago, in *Rasul*, this Court explained that the common law writ extends to both citizens and aliens within United States territory. 542 U.S. at 481. In turn, the Court reasoned that because the United States exercises exclusive jurisdiction and control over Guantanamo, "[a]pplication of the habeas statute to persons detained at the base is consistent with the historical reach of the writ of habeas corpus." *Id.*; *see* 28 U.S.C. § 2241 (2000). Shortly thereafter, the Department of Defense (DoD) instituted Combatant Status Review Tribunals (CSRTs) to ascertain whether each detainee should still be considered an enemy combatant and remain detained at the Guantanamo facility. *See* Memorandum for the Secretary of the Navy, Order Establishing Combatant Status Review Tribunal (July 7, 2004) ("CSRT Order"); Memorandum of the Secretary of the Navy, Implementation of Combatant Status Review Tribunal Procedures (July 29, 2004) ("CSRT Rules").

The following year, with the Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2739 (2005) (DTA), Congress purported to preclude habeas petitions from Guantanamo detainees while providing for a limited review of CSRT determinations in the D.C. Circuit. *Id.* § 1005(e). In *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006), the Supreme Court held that this so-called jurisdiction-stripping provision did not apply to pending cases and therefore found it unnecessary to address its constitutional implications. In response, Congress passed the Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006) (MCA), to preclude detainee habeas petitions in all cases (pending and future).

In the present cases, the court of appeals relied on *Johnson v. Eisentrager*, 339 U.S. 763 (1950), in holding that the Guantanamo detainees have no constitutional right to seek habeas relief because Guantanamo is not within the sovereign territory of the United States. *Boumediene v. Bush*, 476 F.3d 981, 990-92 (D.C. Cir. 2007). This decision flies directly in the teeth of this Court's reasoned conclusion in *Rasul* as to Guantanamo's unique territorial status, which places it within the "historical reach of the writ" as it existed at common law prior to and during the founding era.

The procedures for reviewing enemy combatant status provided pursuant to the DTA and MCA depart dramatically from the core features of habeas relief and are, thus, a wholly inadequate substitute. In particular, they fail to provide an independent forum, an imperative remedy, and a fair opportunity to contest enemy combatant status.

Congress has struggled with the important constitutional questions presented in these cases. The arguments have been aired and re-aired. The time is ripe for this Court to address the constitutional infirmity of the MCA's attempt to curtail the right of habeas corpus. Habeas must be restored to ensure that the rule of law prevails at Guantanamo. This Court should grant review and resolve the matter this term.

ARGUMENT

I. The MCA Precludes Habeas Relief in Pending Cases

As a preliminary matter, this Court should decline Petitioners' invitation to exempt pending cases from the ambit of the MCA. *See Boumediene* Pet. 12-14; *Al Odah* Pet. 25-26. The Petitioners' argument is little more than a red herring aimed at avoiding this Court's review of the pressing constitutional issues. The language of the statute is straightforward: it precludes pending and future actions, both habeas and non-habeas (except for CSRT appeals in the D.C. Circuit), that relate to "any aspect of the detention, transfer, treatment, trial, or conditions of confinement." *See* MCA § 7 (codified at 28 U.S.C § 2241(e)).

Section 7(a) of the MCA removes (1) "jurisdiction to hear or consider an application for a writ of habeas corpus" and (2) "jurisdiction to hear or consider any *other* action . . . relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement." (Emphasis added). In turn, section 7(b) states that "subsection (a) . . . shall apply to *all cases, without exception,* pending on or after the date of the enactment of this Act which relate to any aspect of the detention, transfer, treatment, trial, or conditions of detention." (Emphasis added). Although this list mirrors the list found in the second clause of section 7(a), it does not mean that section 7(b) exempts habeas cases. To the contrary, section 7(b) explicitly references the entirety of 7(a) and conspicuously omits the word "other"—a qualifier used in section 7(a) to address non-habeas actions. In short, there is no significance to section 7(b)'s use of one clause to refer to what section 7(a) refers to in two clauses. *Cf.* MCA § 3(a) (adding 10 U.S.C. § 950j).

Moreover, as Congress debated and passed the MCA, both the Members who supported and the Members who opposed

these provisions recognized the effect on pending habeas cases. *See, e.g.*, 152 CONG. REC. S10357 (Sept. 28, 2006) (Sen. Leahy) ("This new bill strips habeas jurisdiction retroactively, even for pending cases."); *id.* at S10404 (Sen. Sessions) ("I don't see how there could be any confusion as to the effect of this act on the pending Guantanamo litigation.").[3] Similarly, the court below unanimously agreed that the statute impacts pending habeas cases. *Boumediene*, 476 F.3d at 986-88; *id.* at 999 (Rogers, J., dissenting).

Any attempt to avoid this interpretation runs headlong into the plain text and the clear understanding of the legislators. *See Swain v. Pressley*, 430 U.S. 372, 378 n.11 (1977). As a consequence, this Court should move past the statutory argument and determine whether the MCA's jurisdiction-stripping provisions are constitutional.

II. The Great Writ Extends to Guantanamo Detainees

The Constitution provides that "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." U.S. CONST., art. I, § 9, cl. 2. At a minimum, this constitutional protection extends to the writ as it existed at common law in 1789. *INS v. St. Cyr*, 533 U.S. 289, 301 (2001). Although it has expanded since that time, "[a]t its historical core, the writ of habeas corpus has served as a means of reviewing the legality of Executive detention, and it is in that context that its protections have been strongest." *Id.*

In *Rasul*, this Court held that the federal habeas statute was available to aliens being detained at Guantanamo. *See* 542 U.S. at 485; 28 U.S.C. § 2241 (2000). In reaching this conclusion, the Court reasoned that extending habeas to such

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[3] *Accord* 152 CONG. REC. S11197 (Dec. 5, 2006) (Sen. Specter); *id.* at S10364-65 (Sept. 28, 2006) (Sens. Smith and Levin); *id.* at S10269-70 (Sept. 27, 2006) (Sen. Kyl); *id.* at H7544-45 (Rep. Sensenbrenner).

individuals was "consistent with the historical reach of the writ of habeas corpus," given that Guantanamo was "territory over which the United States exercises exclusive jurisdiction and control." *Rasul*, 542 U.S. at 476, 481-82. At common law, the Court declared, "even if a territory was 'no part of the realm,' there was 'no doubt' as to the court's power to issue writs of habeas corpus if the territory was 'under the subjection of the Crown.'" *Id.* at 482 (quoting *King v. Cowle*, 97 Eng. Rep. 587, 598-99 (K.B. 1759)).

The court of appeals held that "[t]he text of the lease and decisions of circuit courts and the Supreme Court all make clear that Cuba—not the United States—has sovereignty over Guantanamo Bay." *Boumediene*, 476 F.3d at 992. However, this conclusion is irrelevant given that, under *Rasul*, the "historical reach of the writ" turns not on *de jure* sovereignty, but rather on *de facto* exclusive jurisdiction and control.

It bears emphasizing that Guantanamo, for the reasons mentioned in *Rasul*, is uniquely situated. 542 U.S. at 471, 480-81. Under the 1903 lease agreement ("*Lease*"), although Cuba retains "ultimate sovereignty," the United States "shall exercise complete jurisdiction and control over and within said areas."[4] Also, pursuant to a subsequent treaty, the arrangement is to last indefinitely and it cannot be unilaterally terminated by Cuba.[5] As Justice Kennedy explained, "Guantanamo Bay is in every practical respect a United States territory, and it is one far removed from any hostilities. . . . From a practical perspective, the indefinite lease . . . has produced a place that belongs to the United States, extending the 'implied protection' of the United States to it." *Rasul*,

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[4] Lease of Lands for Coaling and Naval Stations, Feb. 23, 1903, U.S.-Cuba, art. III, T.S. No. 418.

[5] *See* Treaty Between the United States and Cuba Defining Their Relations, May 29, 1934, U.S.-Cuba, art. III, T.S. No. 866.

542 U.S. at 487 (concurring opinion) (quoting *Eisentrager*, 339 U.S. at 777-78).

Additional facts illustrate this exclusive control. First, under the lease agreement, "[t]he United States exercises exclusive criminal jurisdiction over all persons, citizens and aliens alike, who commit criminal offenses at the Base[.]" *Gherebi v. Bush*, 352 F.3d 1278, 1289 (9th Cir. 2003), *vacated on other grounds*, 542 U.S. 952 (2004).[6] Second, the United States has the power of eminent domain at Guantanamo. *See Lease*, art. III. Third, when Fidel Castro severed water and supplies to the base in 1964, the base promptly "became and remains entirely self-sufficient, with its own water plant, schools, transportation, entertainment facilities, and fast-food establishments." *Gherebi*, 352 F.3d at 1295. Fourth, although Cuba has declared its belief that the United States has not adhered to restrictions in the original agreement, Cuba nonetheless has recognized that it is powerless to do anything about it.[7] Fifth, the base remains in place despite the decidedly rocky relations between the United States and Cuba.

The contrast between Guantanamo and other American military bases, past and present, further highlights the point.

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[6] *See* Lease of Certain Areas for Naval or Coaling Stations, July 2, 1903, U.S.-Cuba, art. IV, T.S. No. 426; *United States v. Lee*, 906 F.2d 117, 117 & n. 1 (4th Cir. 1990) (Jamaican national charged with sexual abuse occurring at Guantanamo); *United States v. Rogers*, 388 F. Supp. 298, 301 (E.D. Va. 1975) (U.S. civilian employee at Guantanamo Bay under contract with the Navy was prosecuted for drug offenses and tried in Virginia).

[7] *Compare Lease*, Art. II (permitting the United States "generally to do any and all things necessary to fit the premises for use as coaling or naval stations only, and for no other purpose"), *with* Statement by the Government of Cuba to the National and International Public Opinion (Jan. 11, 2002) ("Cuba could do absolutely nothing to prevent [other activities]."), *available at* http://ciponline.org/cuba/cubaproject/cubanstatement.htm (last visited Mar. 15, 2007).

For example, Diego Garcia, located in the Indian Ocean, is operated under an agreement with Great Britain that, unlike the Guantanamo lease, is terminable by either party.[8] Similarly, the United States has operated various military facilities under agreements that run only for a specific period of time,[9] articulate very narrow purposes,[10] or provide for joint control.[11] Indeed, Landsberg, the post-WWII prison in Germany that housed the petitioners in *Eisentrager*, was operated "under three flags" (United States, Great Britian, and France). *Gherebi*, 352 F.3d at 1287 n.10. In still other instances of American control abroad, the host country has pressured the United States to leave or make changes.[12] Such is not the case at Guantanamo, where the United States "is

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[8] *See* Availability of Certain Indian Ocean Islands for Defense Purposes, Dec. 30, 1966, U.S.-U.K., para. 11, 18 U.S.T. 28 (terminating two years after "either Government shall have given notice of termination to the other"); *see also, e.g.*, Establishment of Long Range Aid to Navigation Station in the Bahama Islands, June 24, 1960, U.S.-U.K., art. XXVI, 11 U.S.T. 1587; Mutual Defense Treaty, October 1, 1953, U.S.-S. Korea, art. VI, 5 U.S.T. 2368.

[9] *See, e.g.*, Treaty Regarding United States Defence Areas and Facilities in Antigua, Jan. 1, 1978, U.S.-Ant. & Barb., art. XXIV, 29 U.S.T. 4183 ("This Agreement shall come into force on January 1, 1978, and shall remain in force through December 31, 1988.").

[10] *See, e.g.*, K. L. Storrs & C. Veillette, CRS Report, *Andean Counterdrug Initiative (ACI) and Related Funding Programs: FY2005*, at 18 (May. 10, 2005) (describing agreement for use of location "solely for the detection of drug trafficking flights in the region").

[11] *See, e.g.*, Defense of Greenland, June 8, 1951, U.S.-Den., art. II, 2 U.S.T. 1485.

[12] *See, e.g.*, D. Priest, *CIA Holds Terror Suspects in Secret Prisons*, WASH. POST., Nov. 2, 2005, at A1 (reporting that, in 2003, the Thai government insisted CIA shut down "black" site where it was holding and interrogating suspected terrorists); M. Wald, *U.S. Curbs Low-Flight Training in Italy Near '98 Ski-Lift Deaths*, N.Y. TIMES, Mar. 11, 1999, at A7 (describing Italian response to accident involving U.S. pilots based out of Aviano).

accountable to no one." G. L. Neuman, *Anomalous Zones*, 48 STAN. L. REV. 1197, 1230 (1996); *see also Gherebi*, 352 F.3d at 1300 ("[T]he United States' territorial relationship with the Base is without parallel today[.]").

Consequently, the lower court's reliance on *Eisentrager* is misplaced. *See Boumediene*, 476 F.3d at 990-92. In *Eisentrager*, this Court turned back the habeas claims of enemy aliens who were captured, tried, convicted, and detained on non-U.S. territory. Once Guantanamo is understood to be a U.S. territory for these purposes, as *Rasul* holds it must, then *Eisentrager* no longer controls. Nor can the court below draw support from the DTA provision stating that "'United States,' when used in a geographic sense . . . does not include the United States Naval Station, Guantanamo Bay, Cuba." DTA § 1005(g). Whether or not "the determination of sovereignty over an area is for the legislative and executive departments," *Vermilya-Brown Co. v. Connell*, 335 U.S. 377, 380 (1948), *see Boumediene*, 476 F.3d at 992, the inquiry, per *Rasul*, into the common law scope of the writ turns not on formal sovereignty but rather on the functional level of control. Here, it is plain that the U.S. exercises such control over Guantanamo.

In short, contrary to the court of appeals decision, *Rasul*'s analytical path leads inexorably to the conclusion that the Constitution prevents Congress from eliminating the writ for the Guantanamo detainees—absent the prerequisites for suspension (rebellion or invasion), which no one asserts here. With Guantanamo under the plenary control of the United States and isolated from the heat of battle, the "ordinary constitutional processes" can, and must, move forward. *Korematsu v. United States*, 323 U.S. 214, 234 (1944) (Murphy, J., dissenting); *see also Rasul*, 542 U.S. at 487 (Kennedy, J., concurring) (observing that Guantanamo is "far removed from any hostilities").

III. The Framework For Challenging Detention Is an Insufficient Substitute for the Great Writ

Although the MCA deprives the Guantanamo detainees of habeas corpus, the Suspension Clause will not be offended if there remains a substitute collateral remedy that is "neither inadequate nor ineffective to test the legality of a person's detention." *Swain*, 430 U.S. at 381; *see also St. Cyr*, 533 U.S. at 314 n.38; *Sanders v. United States*, 373 U.S. 1, 14 (1963). However, no adequate substitute appears here.

This Court has upheld statutory alternatives that shifted the challenge to a different court, but did not otherwise materially alter the nature of the habeas remedy. *See Swain*, 430 U.S. at 383-84 (upholding provision shifting habeas challenges to local D.C. courts, notwithstanding the lack of tenure and salary protections); *United States v. Hayman*, 342 U.S. 205 (1952) (upholding 28 U.S.C. § 2255, which provides for actions to be brought by federal convicts in the sentencing district rather than the district of detention). These substitutes avoided constitutional difficulties largely by virtue of an escape clause allowing habeas relief any time the alternative proves "inadequate or ineffective." *Swain*, 430 U.S. at 381; *Hayman*, 342 U.S. at 223.[13] No such escape clause exists here. Rather, the procedures established under the DTA remain the sole mechanism by which detention may be challenged.

Moreover, far from a mere change in venue, the procedures available to the Guantanamo detainees for contesting deten-

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[13] Restrictions on filing successive petitions have also been approved because such constraints fall "well within the compass of [the] evolutionary process" of the writ. *Felker v. Turpin*, 518 U.S. 651, 664 (1996). Lower courts have upheld other modest limitations, such as a one-year statute of limitation—albeit often acknowledging equitable tolling as a means to avoid constitutional impropriety. *See, e.g., Souter v. Jones*, 395 F.3d 577, 602 (6th Cir. 2005); *Delaney v. Matesanz*, 264 F.3d 7, 12 (1st Cir. 2001); *Miller v. Marr*, 141 F.3d 976, 978 (10th Cir. 1998).

tion represent a dramatic departure from the essence of habeas relief and, accordingly, are ill-suited as an alternative. The limited status review mechanisms include CSRTs (to assess the detainees' status upon arrival) and Administrative Review Boards (ARBs) (to reassess the status annually). Congress has not spelled out the precise frame-work for the CSRTs and ARBs—except that they must "pro-vide for periodic review of any new evidence" and must, "to the extent practicable, assess" the probative value of any statements resulting from coercion, DTA § 1005(a)(3), (b)—and has, instead, entrusted the DoD to fill in the gaps, *see id.* § 1005(a)(1)(A). While a limited appeal of CSRT decisions is available to the D.C. Circuit, *see id.* § 1005(e)(2); MCA § 10, the courts are otherwise barred from hearing actions (including habeas petitions) relating to the "detention, transfer, treatment, trial, or conditions of confinement" of alien detainees alleged to be enemy combatants, *see* MCA § 7.

Whatever the precise metes and bounds of the inviolable core of habeas, the framework established by the MCA and DTA provides an insufficient substitute for habeas because it lacks three fundamental features: a hearing before an impartial adjudicator, an imperative remedy, and a fair opportunity to rebut the charges.

A. The Framework Lacks an Independent Tribunal

The MCA and DTA fail to provide an independent forum in which to contest executive detention in the first instance. Instead, detainees must face a non-neutral tribunal—a CSRT staffed with executive branch officials. *See* CSRT Rules, encl.1 § (C). Labeling the CSRT members as "*neutral* commissioned officers," *id.* (emphasis added), is of little comfort to the detainee, whose plea for release depends on the very executive branch that is detaining him. Indeed, that turns traditional habeas corpus on its head, putting the king in the role of both jailer and judge. *See Lonchar v. Thomas*, 517

U.S. 314, 322 (1996) (describing the writ's "most basic purpose" as "avoiding serious abuses of power by a government, say a king's imprisonment of an individual without referring the matter to a court"); *Boumediene*, 476 F.3d at 1005 (Rogers, J., dissenting) ("[T]hese proceedings occur before a board of military judges subject to command influence."); *cf. Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004) (plurality) (citizen entitled to "neutral decisionmaker" in challenging enemy combatant status in habeas action).

The CSRTs and ARBs are in no sense independent and, accordingly, are not a passable substitute to the great writ. Indeed, in practice, the CSRT procedures have allowed the government, upon receiving an unfavorable CSRT decision, to convene multiple tribunals until the detainee is found to be an enemy combatant. *See Boumediene*, 476 F.3d at 1006-07 (Rogers, J., dissenting).

Moreover, such a fundamental flaw cannot be remedied on review, especially given the limited scope of authority afforded the D.C. Circuit in conducting its review. *Cf. Hamdan*, 126 S. Ct. at 2807 (Kennedy, J., concurring) (expressing concern for DTA's limited review of military commissions and noting that "provisions for review of legal issues after trial cannot correct for structural defects . . . that can cast doubt on the factfinding process and the presiding judge's exercise of discretion during trial"). This deficiency alone warrants this Court's prompt intervention.

B. The Framework Lacks an Imperative Remedy

The MCA and DTA also do not provide the power to order the release of individuals whose indefinite detentions are contrary to law. At its core, the writ's function is "to afford a *swift and imperative* remedy in all cases of illegal restraint upon personal liberty." *Price v. Johnston*, 334 U.S. 266, 283 (1948) (emphasis added), *overruled on other grounds*, *McCleskey v. Zant*, 499 U.S. 467 (1991). As imported from

England, "the use of habeas corpus to *secure release* from unlawful physical confinement . . . was thus an integral part of our common-law heritage." *Preiser v. Rodriguez*, 411 U.S. 475, 484 (1973). This is reflected, for example, in the federal statute providing post-conviction relief for federal convicts (as a substitute to habeas under § 2241): if the sentence is illegal, the court is authorized to "discharge the prisoner" after "vacat[ing] and set[ting] the judgment aside." 28 U.S.C. § 2255. While the writ may, over time, have expanded, a claim for "immediate release . . . lies at 'the core of habeas corpus.'" *Wilkinson v. Dotson*, 544 U.S. 74, 79 (2005).

1. A CSRT has no power to order a detainee released, even if it determines that the detainee is not an enemy combatant. As implemented, if the CSRT "determines that the detainee shall no longer be classified as an enemy combatant," its decision (after approved by the Director) is forwarded "in order to *permit* the Secretary of State to coordinate the transfer of the detainee with representatives of the detainee's country of nationality for release *or other disposition* consistent with applicable laws," CSRT Rules, encl.1 § (I)(9) (emphasis added), and "consistent with domestic and international obligations and the foreign policy of the United States," CSRT Order § (i). Also, the "implementing directive is subject to revision at any time." CSRT Rules at 2. The lack of a remedy is apparent from this permissive language.

2. In similar fashion, an ARB offers little remedial hope. An ARB, which convenes annually to reassess detainee status, is directed to "conduct its own proceeding and make an independent recommendation notwithstanding any prior determinations" and, thereafter, "make a recommendation" to the Designated Civilian Officer (DCO) to release, transfer, or continue to detain. Memorandum for Secretaries of the Military Departments, Revised Implementation of Administrative Review Procedures, encl.3 § 1(b) (July 14, 2006). The

DCO "decides whether to release, transfer with conditions, or continue to detain the enemy combatant" and coordinates with various cabinet departments "to implement any enemy combatant release or transfer according to established Deputy Secretary of Defense policy." *Id.*, encl.4 § 5(c)-(d).

The non-mandatory language of the rules establishing both the CSRTs and ARBs, in the absence of statutory constraints, provides ample wiggle room for continued detention at the discretion of the executive officials—who are under no obligation to reach an agreement with the host countries at all, let alone in an expeditious fashion. By claiming it has not received adequate assurances from the home countries to address security risks posed by the individuals to be released, the executive branch can refrain indefinitely from actually releasing the detainees.[14] In short, neither the CSRTs nor the ARBs have the authority to require the executive to release any detainees, even ones designated for release or found no longer to be enemy combatants.

3. Nor is the D.C. Circuit given authority to order release. Even if that court, in exercising its limited review, concludes that the CSRT's procedures were improper—that is, the court determines either that the CSRT did not comply with the Defense Secretary's "standards and procedures" or that the "standards and procedures" are inconsistent with the Constitution and laws of the United States—the court is only given authority "to determine the validity of any final decision of a [CSRT]." DTA § 1005(e)(2)(A), (C). Voiding the CSRT's decision would thus apparently leave the detainee in his *ex ante* position—*i.e.*, detained.

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[14] *See* Dep't of Defense, Transcript of Press Conference (Mar. 6, 2007) (discussing 80 detainees still in custody despite being "designated for release or transfer"), *available at* http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=3902 (last visited Mar. 12, 2007).

In sum, lacking an imperative remedy, these procedures cannot be an adequate substitute for the great writ. As has been the case over the last five years, such "indefinite detention of an alien" represents a "serious constitutional problem," *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001), impacting "friends and foes alike." *Rasul*, 542 U.S. at 488 (Kennedy, J., concurring).

C. The Framework Fails to Afford a Fair Opportunity to Rebut the Accusations

In light of the *Rasul* Court's characterization of Guantanamo as being under plenary U.S. control—which perhaps makes it akin to the "unincorporated territories" in the *Insular Cases*—the detainees are entitled to at least a bare minimum of due process in contesting enemy combatant status.[15] However, the framework established by the MCA and DTA falls short and, accordingly, is an inadequate substitute for habeas corpus.

In *Hamdi v. Rumsfeld*, a plurality of this Court determined that, upon seeking habeas relief, a citizen captured in a foreign country and detained within the United States as an enemy combatant must be given notice of the factual basis underlying his classification, a fair opportunity to rebut the

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[15] *See, e.g., Balzac v. Porto Rico*, 258 U.S. 298, 312-13 (1922) (constitution affords "certain fundamental personal rights" to inhabitants of territories not yet "incorporated" by Congress); *Haitian Ctrs. Council, Inc. v. McNary*, 969 F.2d 1326, 1342-43 (2d Cir. 1992) ("fundamental constitutional rights" are guaranteed to Guantanamo inhabitants), *vacated as moot*, 509 U.S. 918 (1993); *Gov't of the Canal Zone v. Scott*, 502 F.2d 566, 568 (5th Cir. 1974) (treating Canal Zone as unincorporated U.S. territory); 35 Op. Att'y Gen. 536, 540 (1929) (Canal Zone grant "appear[s] to be no less comprehensive a grant that the lease from Cuba"); Neuman, *supra*, at 1200 (comparing Guantanamo to Canal Zone); *but see Cuban Am. Bar Ass'n, Inc. v. Christopher*, 43 F.3d 1412, 1425 (11th Cir. 1995); *cf. Vermilya-Brown*, 335 U.S. at 405 (Jackson, J., dissenting) (arguing Guantanamo is not a "possession").

government's assertions before a neutral decisionmaker, and the assistance of counsel. 542 U.S. at 533, 539. As the plurality explained, the Due Process Clause "informs the procedural contours" of the writ of habeas corpus. 542 U.S. at 525; *see also* D. Shapiro, *Habeas Corpus, Suspension, and Detention: Another View*, 82 NOTRE DAME L. REV. 59, 75 n.67 (2006) ("[T]he habeas remedy (or an adequate alternative) and the right of a detainee not to be deprived of liberty without due process are intertwined.").

While this does not necessarily indicate that the same level of constitutional protection must attach to detainees held at Guantanamo,[16] at least some minimal fundamental due process protections must apply to the detainees in light of the indefinite nature of the detention on territory over which the United States exercises complete jurisdiction and control. *See Rasul*, 542 U.S. at 487 (Kennedy, J., concurring) (Guantanamo is under the "implied protection" of the United States); *Zadvydas*, 533 U.S. at 690 ("A statute permitting indefinite detention of an alien would raise a serious constitutional problem."); *Verdugo-Urquidez*, 494 U.S. 259, 271-72 (1990) (reserving the question whether a "lawful but involuntary" presence, if prolonged, would constitute "substantial connections with this country" such that constitutional protections attach).

These are not "some undefined, limitless class of noncitizens who are beyond our territory." *Verdugo-Urquidez*, 494 U.S. at 275 (Kennedy, J., concurring). These are 385 individuals who "face continued detention, perhaps for life," and, even though aliens are "subject to limitations and conditions not applicable to citizens," they are nonetheless entitled to a "fair hearing under lawful and proper procedures." *Zadvydas*, 533 U.S. at 718 (Kennedy, J., dissenting);

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[16] *Cf. Dorr v. United States*, 195 U.S. 138 (1904) (no Sixth Amendment right to jury trial in Philippines, which was then an insular possession).

see also Hamdi, 542 U.S. at 530 ("[A]n unchecked system of detention carries the potential to become a means for oppression and abuse of others who do not present [an immediate] threat [to the national security of the United States during ongoing international conflict].").

The framework prescribed by statute and implemented in the CSRTs does not guarantee a detainee sufficient opportunity to contest his status as an enemy combatant. First, the detainee "shall not be represented by legal counsel," and will only have access to a "Personal Representative"—who is a commissioned officer appointed by the Director, and with whom "no confidential relationship exists." CSRT Rules, encl.1 § (F)(5); *id.*, encl.3 §§ (A)(1), (C)(1). Access to legal counsel has long been held to be an essential aspect of challenging one's detention. Second, the evidentiary standards raise serious concerns due to the potential use of information obtained under abusive interrogation techniques; the limitation on discovery of classified information; the admission of hearsay evidence; the tribunal's discretion to screen out evidence found to be not "reasonably available"; the government's low burden of proof; and the rebuttable presumption in favor of the government's evidence. *See* DTA § 1005(b)(1), (e)(2)(C)(i); CSRT Rules, encl.1 §§ (B), (E)(2)-(3), (F)(6), (F)(8), (G)(2), (G)(7), (G)(9)-(11), (H)(7). While some of these elements might be individually justifiable depending on the circumstances, *see Hamdi*, 542 U.S. at 533-34 (giving qualified approval of hearsay evidence and rebuttable presumptions) (plurality), in the aggregate, this framework denies a detainee a "fair opportunity to rebut the Government's factual assertions" and "present his own factual case to rebut the Government's return," *id.* at 533, 538; *see also Boumediene*, 476 F.3d at 1004-06 (Rogers, J., dissenting).

One particular anecdote, recounted in an opinion rendered by the United States District Court for the District of Colum-

bia below, brings the matter into focus. *See In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443 (D.D.C. 2005). An individual was being detained on allegations that he was "associated with a known Al Qaida operative." *Id.* at 469. However, he was not told his purported associate's name (the tribunal did not even know it) and was unable to view the evidence against him (if there even was any). Unable to defend himself, he simply denied the charges and stated: "I was hoping you had evidence that you can give me. . . . [I]f a supervisor came to me and showed me accusations like these, I would take these accusations and I would hit him in the face with them. Sorry about that." *Id.* The resulting laugher by those in the tribunal room demonstrates the absurdity of the situation. As the district court judge noted, it would have been humorous, had it not been so serious and "had the detainee's criticism of the process not been so piercingly accurate." *Id.* at 470. This is hardly an adequate substitute for habeas corpus.

Congress is, of course, capable of amending the statute not just to *recognize* the CSRTs and ARBs, *see* DTA § 1005(a)(1)(A), but to further prescribe a framework commensurate with traditional habeas review. By making clear that certain constitutional minimums apply, this Court will preserve Congress's role in mapping out the way forward while simultaneously allowing the detainees the opportunity to be heard and to advance the merits of their individual cases.

IV. This Court's Guidance is Necessary as a Bulwark of Liberty

Within Congress, there has been extensive debate over the last few years regarding the Guantanamo detainees' access to habeas corpus. Some Members have argued that the provisions in the MCA (and, before that, the DTA) stripping the courts of habeas jurisdiction, MCA § 7; DTA § 1005(e), pass

constitutional muster.[17] Others have taken the contrary position.[18] Moreover, some lawmakers have explicitly sought to amend or delete the offending MCA habeas provisions.[19] In the last Congress, the Senate Judiciary Committee held three hearings, chaired by *amicus*, examining the detainees' situation and considering testimony from a wide array of legal authorities.[20]

While this exchange of ideas is surely healthy and appropriate, the conversation has begun to generate diminishing returns. Meanwhile, the detainees wait, and uncertainty surrounds a fundamental constitutional principle. If the Court declines to resolve these important issues in this term, the detainees could face more than another full year in legal limbo. Although Congress will continue to discharge its

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[17] *See, e.g.*, 152 CONG. REC. S10359 (Sept. 28, 2006) (Sen. Sessions); *id.* at S10265-67 (Sept. 27, 2006) (Sens. Graham and Warner); *id.* S10267-72 (Sen. Kyl); *id.* at S10272-73 (Sen. Cornyn).

[18] *See, e.g.*, 153 CONG. REC. S2962-63 (Mar. 9, 2007) (Sen. Leahy); *id.* at S2749-51 (Mar. 7, 2007) (Sen. Specter); 152 CONG. REC. S10366 (Sept. 28, 2006) (Sen. Dodd); *id.* at S10264-65 (Sept. 27, 2006) (Sen. Specter); *id.* at S10243 (Sen. Levin); *id.* at S10361 (Sen. Feingold); *id.* at S10400 (Sen. Kennedy); *id.* at S10409 (Sen. Biden); *id.* at H7548, H7550, H7559 (Reps. Conyers, Lofgren, Nadler, and Jackson-Lee); 151 CONG. REC. S14309 (Nov. 10, 2005) (Sen. Bingaman); *id.* at H11866 (Dec. 15, 2005) (Rep. Kucinich).

[19] *See, e.g.*, Habeas Corpus Restoration Act of 2007, S. 185, 110th Cong.; Habeas Corpus Restoration Act of 2006, S. 4081, 109th Cong.; Effective Terrorists Prosecution Act of 2006, S. 4060, 109th Cong.; S.A. 5087, 109th Cong. (2006).

[20] *See Examining Proposals to Limit Guantanamo Detainees' Access to Habeas Corpus Review: Hearing Before the Senate Comm. on the Judiciary*, 109th Cong. (Sept. 25, 2006); *Hamden v. Rumsfeld: Establishing a Constitutional Process: Hearing Before the Senate Comm. on the Judiciary*, 109th Cong. (July 11, 2006); *Detainees: Hearing Before the Senate Comm. on the Judiciary*, 109th Cong. (June 15, 2005).

duties, at the end of the day, it falls to this Court to say, emphatically, what the law is.

In an address at Buffalo Law School in 1951, Justice Jackson warned that "suspension of privilege of the writ of habeas corpus is in effect a suspension of every other liberty." Robert Jackson, *Wartime Security and Liberty Under Law*, 1 BUFFALO L. REV. 103, 109 (1951). To avoid an incongruous legal "black hole" at Guantanamo, the Court should review one or both of these cases, strike down the MCA's illegal suspension of the great writ, and pave the way for Congress to address this challenging situation consistent with the constitutional reach of the writ.

CONCLUSION

This Court should grant the petitions for a writ of *certiorari* and move expeditiously to decide the cases this term.

Respectfully submitted,

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